No. 95-789

In The

Supreme Court of the United States

October Term, 1995

CALIFORNIA DIVISION OF LABOR STANDARDS ENFORCEMENT, et al.,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., and MANUAL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS AND SUGGESTING REVERSAL

ROBERT E. JESINGER #59550
Counsel of Record
MARK S. RENNER #121008
WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN
101 Park Center Plaza, Suite 900
San Jose, CA 95113
(408) 297-9172

Counsel for Amici Curiae California Association of the Sheet Metal and Air Conditioning Contractors National Association; Sheet Metal and Air Conditioning Contractors National Association; Associated Plumbing & Mechanical Contractors of Sacramento, Inc.; Sacramento Chapter of the National Electrical Contractors Association; Mechanical Contractors Association of America; Northern California Mechanical Contractors Association; Northern California Drywall Contractors Association; Associated Roofing Contractors; Plumbing & Piping Industry Council, Inc.; Plumbing, Heating, Cooling Contractors of California; Construction Employers Association; and Northern California Contractors Association

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CONSENT FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Petitioners and Respondent, through their counsel, have consented to the filing of this Brief *Amici Curiae*. The original form indicating the consent of all parties was submitted to the Clerk of this Court with the filing of this Brief *Amici Curiae*.

INTEREST OF *AMICI CURIAE*

All of the *Amici* are contractor associations whose members have participated in apprenticeship training programs and made substantial contributions to those programs in the State of California, and in some cases throughout the United States. Their member employers have in the past employed apprentices on California State and on Federal public works projects, utilizing the apprentice wage specific rate (lower than journey level prevailing rate) for these apprentices who are duly registered in programs approved by the State of California as meeting Federal standards.

The California Association of the Sheet Metal and Air Conditioning Contractors National Association represents 440 contractors who perform commercial and residential air conditioning and heating, architectural sheet metal, industrial sheet metal, kitchen equipment, metal roofing, sheet metal fabrication, manufacturing, testing and balancing of heat and air, siding and decking. They perform work throughout the western United States and employ and train 971 apprentices in the State of California.

The Sheet Metal and Air Conditioning Contractors' National Association, Inc. has approximately 1900 contractor members engaged in the sheet metal and air conditioning portion of the building and construction industry throughout the United States. Organized contractors in the sheet metal industry represented by this Association train and employ about 10,000 apprentices nationwide and pay approximately $35-40 million into local, regional and national training programs on an annual basis.

The Associated Plumbing & Mechanical Contractors of Sacramento, Inc. represent 50 contractors who perform plumbing and piping work in commercial, industrial and residential construction. This work takes place mostly in six northern California counties. Together, these contractors train and employ approximately 100 registered apprentices.

The National Electrical Contractors Association, Sacramento Chapter, represents 60 electrical contractors active in industrial, commercial and residential electrical work throughout northern California and northern Nevada. These contractors train and employ over 160 apprentices.

Mechanical Contractors Association of America is a national organization representing over 1,400 employers in the mechanical construction industry. It operates through 75 local affiliate organizations nationwide, all of which are involved in participating apprenticeship training.

The Northern California Mechanical Contractors Association represents 150 contractors who perform

plumbing, piping, heating, air conditioning, and refrigeration work in industrial, commercial and residential construction. This work is performed in northern California and in Nevada. They train and employ approximately 650 registered apprentices.

The Northern California Drywall Contractors Association represents 60 contractors working in the drywall installation and taping industry in the 46 Northern California counties. They train and employ approximately 360 drywall installer apprentices and 71 taper apprentices.

The Associated Roofing Contractors represent 20 large roofing contractors who perform work throughout the same 46 northern California counties. Their members train and employ about 600 apprentices.

The Plumbing & Piping Industry Council, Inc. represents 400 plumbing and piping contractors engaged in this business in the States of California, Arizona, Washington, Oregon, Utah, Colorado, Nevada, Idaho, and Hawaii. They train and employ some 1,000 apprentices.

The Plumbing, Heating, Cooling Contractors of California operates a California State approved unorganized apprenticeship program. It represents 400 contractor members who are engaged in high technology and public works jobs throughout California involving industrial, commercial and residential projects. Their program trains and their members employ approximately 600 apprentices.

The Construction Employers' Association represents 100 general contracting firms in the building and construction industry who perform commercial construction predominately in the 46 Northern California Counties, although some are engaged in such construction nationwide. In connection with this work, they train and employ approximately 800 apprentices on a day-to-day basis and contribute an average of $1.1 million each year for such training programs.

The Northern California Contractors Association represents 20 unionized contractors who perform residential framing and related carpentry work predominately in the San Francisco Bay Area Counties. They regularly employ apprentices and contribute to pay for such training.

The *Amici Curiae* support the position of the State of California, et al. (Petitioners herein) and seek reversal of the opinion of the United States Court of Appeals for the Ninth Circuit in *Dillingham v. State of California*, as reported at 57 F.3d 712 (9th Cir. 1995).

SUMMARY OF ARGUMENT

An apprentice specific wage rate (lower than that required to be paid to journey level workers on prevailing wage jobs) is essential for the *Amici* contractors to be able to use apprentices economically on public works projects. Apprentices are not as productive as journey level workers. Quality apprenticeship training is expensive. Yet, the effect of the Ninth Circuit opinion creates an economic disincentive for contractors to enter into

apprenticeship agreements that meet the Federal standards for training. Before *Dillingham*, in order to pay the lower apprentice rate, a contractor had to objectively demonstrate that it was actually funding apprentice training to a minimum level by meeting the minimum standards of the Federal Fitzgerald Act enforced by the California State approval process. 29 U.S.C. § 50, 29 C.F.R. § 29.2(e) and Cal. Code Regulations Title 8, § 205(f). Now, unscrupulous contractors can withhold funding, yet still benefit by the lower wage scale. The *Amici* Contractors cannot ignore the economic realities of this inequity.

ERISA was never intended to preempt such traditional areas of State regulations as prevailing wage laws simply because those laws inevitably are applied to employees who happen to be apprentices. Under this Court's test set forth in *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers*, 115 S.Ct. 1671 (1995), ERISA's preemption provision does not reach to such traditional areas of State regulation. The State must still be empowered to differentiate between an employee on a public work who is enrolled in a legitimate apprenticeship program where payment of a lower than journeyman level wage rate is justified because the employee is demonstrably receiving the benefits of a legitimate apprenticeship program and an employee who is simply classified by the employer as an apprentice to justify paying the lower wage rate without any showing that actual apprenticeship training benefits are being received by the employee.

Moreover, if the preemptive effect of ERISA is to strip the States of their traditional power to regulate wages on public works, *Amici* contractors will be forced to radically

alter the markets in which they participate in a way that will ultimately and profoundly affect the Federal regulation of apprenticeship under the Fitzgerald Act, 29 U.S.C. § 50. By ultimately thwarting the goals and standards of the Fitzgerald Act, Federal law will be impaired, thus excepting preemption of the State's regulatory power at issue here under ERISA's "savings clause." Because of this disruption of existing Federal law, the State's power to regulate prevailing wages for apprentices must be preserved notwithstanding the broad effect of ERISA's preemption provision.

ARGUMENT

I

ERISA's Preemption Provision Was Not Intended to Displace The State's Power to Distinguish Between Legitimate and Sham Apprenticeship Programs For Purposes of Determining the Appropriate Prevailing Wage

Contractors who voluntarily assume training responsibilities under apprenticeship agreements which meet Federal standards incur costs greater than their competitors who do not agree to meet such training standards. This is a cost which these contractors may not be able to afford with respect to public sector projects because of the competitive bidding statutes. These statutes generally require that the public agency award the bid to the "lowest responsible bidder." If ERISA is interpreted to preempt State prevailing wage laws, an unscrupulous contractor will be able to classify all of its workers at the lower apprentice specific wage rate, without having to

meet the Federal standards for apprenticeship training, and thereby obtain a decisive bidding advantage over contractors who have assumed full financial and legal responsibility for meeting the higher and more costly training standards for State approved apprenticeship programs.

Thus, ethical contractors who do not wish to turn prevailing wage laws into the sham now permitted by *Dillingham* will lose public works bids to those contractors who are willing to style all of their workers as "apprentices" and pay them the lowest wages. They can pay the lowest wage after *Dillingham* without committing any resources to actually pay for apprentice off-the-job training. These unethical competitors will have an unfair economic advantage in the bid process by using "paper only" apprentices, i.e., lower paid because they are called apprentices, not because they are being properly trained.

If the Ninth Circuit's preemption analysis is upheld, California's traditional State power to declare which employees can be legitimately paid a lower rate on public construction works is stripped away, and an unseemly charade of competing contractors, all claiming to be engaged in apprenticeship training, but whose supposed apprenticeship activities are beyond the scrutiny of the State, will inevitably result. Workers who have years and years of experience in a trade can one day be issued the emperor's proverbial set of new clothes and become *instant apprentices* [for pay purposes]. If ERISA is said to preempt the State power, the State is left with no authority to question such a charade, for questioning the legitimacy of their new apprentice status becomes the legal equivalent of saying the magic word, the duck comes

down, and ERISA's preemptive effect trumps all. The result is that the prevailing wage statute is neatly and completely circumvented, allowing mischievous contractors to vastly underpay their work forces on public construction projects to the competitive detriment of responsible contractors who attempt to comply with the letter and the spirit of such employee-protective statutes.

If the State's power to distinguish between legitimate and sham apprenticeship programs is preempted, competing bidders on State public works are apt to use virtually any assumption they want to estimate labor costs, all depending on how far that employer wants to stretch his own personal definition of "apprentice." Whether or not that employer will bother to provide any legitimate off-the-job training, on-the-job journeyperson assistance, or any other hallmark of a legitimate apprenticeship program, will be outside of the State's power to determine. This inevitably produces a downward pressure on what prevailing wages will be for State public works. This will occur because at the very least *some* contractors submitting bids will assume that a large segment of their work force could permissibly be classified as apprentices regardless of the type of work performed or the skill level of the employee. Competing bidders will in turn eventually have to adjust their assumptions about permissible wage rates in order to have any hope of becoming the lowest bidder. Creation of such a downward pressure on prevailing wages through an entirely contrived devaluation of appropriate compensation is directly contrary to the legislative intent of the prevailing wage statutes – to insure that when the government engages in construction projects, in order to provide fair compensation for the

employees working on those projects, the prevailing wage in the area is to be paid for the labor – not just the lowest possible price.

The net effect of the Ninth Circuit's application of ERISA preemption principles is that through the rubric of preempting State regulation of apprenticeship, State regulation of employee wages is also preempted, swept away in the unbounded logic that such State statutes controlling wages "relate to" an apprenticeship plan, and are therefore preempted. This is precisely the illogical analysis rejected by this Court in *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers,* 115 S.Ct. 1671 as an overly mechanical application of the statute's phrase "relate to." The effect of preemption of the State's control over its prevailing wage laws here goes far beyond the "objectives of the ERISA statute," – the measure to be used in discerning "the scope of the State law Congress understood would survive" ERISA's preemption provision. *Travelers* at 1677. Consequently, ERISA's preemption provision need not and does not displace the State's traditional power to determine the appropriate prevailing wage for a given employee by distinguishing between a bona fide apprenticeship program and a sham operation connived for the purposes of circumventing State prevailing wage laws.

II

The Savings Clause in ERISA's Preemption Provision Preserves the State's Ability to Judge the Legitimacy of Apprenticeship Training Programs

The Federal Davis-Bacon Act (40 U.S.C. § 276a to 276a-5) rules regarding the payment of prevailing wages

on Federal public works projects restrict the discounted wage rate to apprentices registered in approved programs. 29 C.F.R. § 5.5(a)(4). The State of California, as well as numerous other States, has also had a long standing requirement that a contractor utilize apprentices registered in approved programs in order to receive the wage break and pay the apprentice at the apprentice wage specific rate. If that long standing power is stripped away by ERISA's preemption provision, what inevitably results is a two-tiered system of apprenticeship – a journey level worker can become an apprentice on a State public work without any further State scrutiny of that classification, but is required to be paid the appropriate journey level wage on a Federal public work. This inconsistency can only be avoided if the State retains the power to approve an apprenticeship program without interference from ERISA's allegedly preemptive elimination of that power.

Contractors are also, as a result of the Ninth Circuit's opinion, subject to conflicting State regulation in that they must employ apprentices enrolled with State approved programs on Federal jobs in order to get the lower rate but need not employ such apprentices on State public works jobs. This new dual system for operation of apprenticeship programs necessarily will cause a radically different practice in contractors' bidding practices for State and Federal public works. With the Federal public work standards still subject to the Federal apprenticeship standards, but with State public works completely cast adrift because of the State's inability to determine between a legitimate apprentice and a sham apprentice, in order to remain competitive in bidding for

these respective markets, contractors will be forced to choose to remain in only one or the other, but not both. Apprenticeship training will become meaningless for that market sector bidding on State public works because it will simply be a device to obtain a lower wage rate for unlimited number of employees. Apprenticeship training on Federal public works will be limited to sponsors who are willing to uphold the Federal standards by completely giving up the State public works market, thereby necessarily decreasing those willing to participate in Federal apprenticeship training as envisioned under the Fitzgerald Act.

Without the power to determine which employees legitimately can be paid the lower apprentice wage rate, this newly "deregulated" market will cause radical, unforeseen and completely unintended consequences in the operation of Federal public works and thus the administration of the Fitzgerald Act. For the contractor who wishes to continue to perform Federal public works, under the Fitzgerald Act approval of the contractor's apprenticeship program for Federal purposes must be maintained. Thus, the apprenticeship standards required under that Act's regulations must be upheld by that contractor on *all* jobs as a condition of receiving the wage break for apprentices on Federal public works. However, with no control over which employees might legitimately be paid the lower apprentice wage rate on State public works, that same contractor could not simultaneously maintain the standards necessary to retain Federal approval for Federal public works and still *competitively* bid on State public works where no standards are maintained. If a contractor lowered itself to the new wide-

open State public works definition (or complete lack thereof) of apprentice, such a practice would taint the employer's legitimate apprenticeship program established and approved for Federal purposes, thus causing the employer to lose Federal approval. This inevitably would force employers to remain eligible for Federal public works only by refusing to participate in the sham practices now competitively impelled under post-preemption State prevailing wage laws, thus shrinking the number of employers willing to uphold and promote labor standards on Federal public works. In addition, contractors currently participating in legitimate apprenticeship training on State public works will be impelled to lower their training and labor standards and drop out of the Federal public works market (because they cannot retain Federal approval with such lowered standards) in order to compete in the State public works sector. This, in turn, will also shrink the number of contractors providing apprenticeship training at the higher Federal standard, thus again threatening the Federal goal of promoting labor standards for apprenticeship.

Any of these results, all impelled by the market forces that are set in operation by preemption of the State's power to approve apprenticeship programs, necessarily impedes the goals, purpose and operation of the Federal Fitzgerald Act. That Act envisions a State-Federal cooperative arrangement whereby both entities formulate and promote "labor standards necessary to safeguard the welfare of apprentices." By exerting an extreme downward pressure on those labor standards existing in the State public works market, and by creating an incentive for those participating in the Federal public works market

to exit that market in order to participate in the newly-unregulated State public works market, the essential purposes, as well as the specific application of the Fitzgerald Act is impaired. As such, under the savings clause of ERISA's preemption provision, this interference with existing Federal laws and regulations mandates that the State's power to regulate apprenticeship in this fashion is saved from ERISA preemption.

CONCLUSION

The Court should reverse the Ninth Circuit because its decision in *Dillingham* is bad for business, bad for the public, and bad for the workers. In this day of deregulation, it may seem odd that a group of construction contractors would welcome State regulation of apprenticeship prevailing wages. But there is a simple and logical reason for this.

Contractors plan for the present as well as the future. The *Amici* contractors are desirous of continuing a healthy, sustained and legitimate apprentice training environment. Indeed, the greatest challenge for construction companies (and indirectly the construction users) in the immediate future is to find a sufficient number of skilled, trained journey level workers. The *Amici* contractors realize this all too well. To have any chance of creating a large enough pool of skilled construction workers, apprentice programs must include certain minimum training standards. Attracting and keeping good workers requires an "appropriate" prevailing pay rate for apprentices based upon the economic conditions in the

State and locale in which they are working. It is not necessary that this appropriate prevailing pay rate be based upon union contract rates or non-union working conditions, but instead is appropriate if it is a prevailing rate. Indeed, Amicus Plumbing, Heating, Cooling Contractors of California presently maintains a State approved unorganized apprentice training program, subject to the same economic realities as the organized programs. However, maintenance of such prevailing rates on State public works projects will be severely eroded if the *Dillingham* preemption analysis is upheld, thus eventually impeding the *Amici* Contractors' overall ability to maintain minimum training standards so as to produce a skilled labor force for their use.

Moreover, maintenance of such minimum training standards must necessarily be accomplished by the mandate of State prevailing wage laws rather than through voluntary private agreements. It would not be appropriate for employers to combine among themselves to agree upon this prevailing rate, without the anti-trust protections of a union contract, because this would violate the anti-trust laws. However, it is permissible for a State, acting as a regulator, to survey and determine the appropriate apprentice specific prevailing rate payable on State public works projects. California Labor Code § 1777.5.

The *Amici* contractors have for years expended substantial sums of money to fund apprentice training programs. This has been economically possible because they could pay the State developed lower prevailing pay rates for their apprentices. This funded training and pay have encouraged apprentices to continue working in the industry and working towards the journey level skill and pay.

In exchange for this substantial funding and participation in approved programs which establish minimum standards to insure the health of the apprentice training environment, the employers who expend such monies have been entitled to pay the lower rate to apprentices enrolled in these programs. The economics of this practice, which have provided business, the public and workers a healthy environment and sustained apprenticeship training growth for over 35 years before ERISA, are severely threatened by an overly broad reading of ERISA's preemption effect. It should be reversed based upon a comparison of the Congressional intent behind ERISA and the Congressional intent behind the Federal Fitzgerald Act, both of which cry out for a result other than the one delivered by the *Dillingham* Court.

Dated: June 17, 1996

Respectfully submitted,

WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN

ROBERT E. JESINGER
MARK S. RENNER